No. 645

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

JOSEPH LEE JONES and BARBARA JO JONES,
Appellants,

vs.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporation,
Appellees.

BRIEF OF THE STATE OF MICHIGAN (CIVIL RIGHTS COMMISSION) AMICUS CURIAE

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Interest of Amicus Curiae

The Civil Rights Commission of the State of Michigan files this brief amicus curiae pursuant to Supreme Court Rule 42 (4) which permits any "State, Territory, or Commonwealth sponsored by its attorney general" to file a brief amicus curiae without the consent of the parties.

The Michigan Civil Rights Commission is a constitutionally created agency of the State of Michigan. It is mandated by Article V, section 29 of the Michigan Constitu-

tion of 1963 to "investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination."

The Commission has recently argued before the Supreme Court of the State of Michigan that the Thirteenth Amendment to the United States Constitution and the federal statute at issue in this case (Civil Rights Act of 1866, 14 Stat. 27, codified at 42 U.S.C., section 1982) guarantee to a Negro citizen the right to acquire a house in a private subdivision free from discrimination because of race or color. The purpose of that argument was to support an order of the Civil Rights Commission, addressed to the developer, ordering him to cease and desist discrimination against a Negro citizen who had sought to purchase a lot and a home and against whom the developer had discriminated, by his own admission, because of that citizen's race and color.

Statement of the Case

Amicus adopts the statement of the case in the Brief of Appellants, Joseph Lee Jones and Barbara Jo Jones.

Questions Presented

The questions presented on pages 2 and 3 of Appellants' Petition for a Writ of Certiorari are as follows:

1. Whether the refusal of respondents, owners of residential developments, to sell a lot and house, otherwise on the market, to petitioners solely because of their race is prohibited:

A. Under the Civil Rights Act of 1866, enacted under the Thirteenth Amendment, or

B. Under the Civil Rights Act of 1866 as re-enacted in 1870 under the Thirteenth and Fourteenth Amendments, or

C. Under the terms of the Thirteenth and Fourteenth Amendments, aside from any federal statutes?

2. Whether the said discriminatory refusal to sell is unlawful, regardless of the existence or degree of state involvement?

3. Whether the state has sufficiently involved itself in the said discriminatory refusal to sell:

A. By its various intertwining acts with respondents, such as licensing, zoning, regulating, and otherwise promoting and assisting the respondents' development, or

B. By its delegation of municipal functions to respondents, or

C. By a combination of these factors so as to make said refusal unlawful?

While supporting the position of the Appellants on all of the questions presented, this brief will address itself solely to Question 1.

Summary of Argument

There is an inherent and fundamental right to acquire property.

The purpose of the Thirteenth Amendment was to secure fundamental rights to citizens of every race and color, including the right to purchase property, which historically was considered one of those fundamental rights.

The 1866 Statute was passed pursuant to Section 2 of the Thirteenth Amendment, and, like the Thirteenth Amendment itself: (1) applies to the actions of private persons, and (2) protects the right to acquire property free from discrimination by private persons because of race or color.

ARGUMENT

I

THE RIGHT TO ACQUIRE PROPERTY FREE FROM DISCRIMINATION BASED ON RACE OR COLOR IS GUARANTEED BY THE THIRTEENTH AMENDMENT TO THE CONSTITUTION AND THE CIVIL RIGHTS ACT OF 1866 PASSED PURSUANT TO THAT AMENDMENT

Prior to the Thirteenth Amendment, the right to purchase property was considered a fundamental right. As early as Blackstone, the right to acquire property was considered a civil right.

> "All property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities."
>
> Cooley's *Blackstone*, Vol. 1, Book II §299 (4th ed.).

The right to acquire and possess property was also con-

sidered a privilege of citizenship, protected by the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution, which reads as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

A leading exposition of what those privileges of citizenship are is *Corfield* v. *Coryell,* 4 Wash. C.C. 371, 6 Fed. Cas. 546, 551, Fed. Cas. No. 3230 (1823). The *Corfield* Opinion, written by Mr. Justice Washington, on circuit, has been quoted numerous times by this Court. (For instance, see *Slaughter House Cases,* 83 U.S. 36 (1873), and *Blake* v. *McClung,* 172 U.S. 240 (1898)).

Mr. Justice Washington wrote:

> "The inquiry is, what are the privileges and immunities of citizens in the several States? *We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principals are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, *with the right to acquire and possess property of every kind,* and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. (at page 551) (Italics added).

Thus, the right to acquire property was considered a fundamental and basic right even prior to the passage of the Thirteenth Amendment.

The 13th Amendment to the United States Constitution was adopted in 1865 and reads as follows:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Section 2. Congress shall have power to enforce this article by appropriate legislation."

In 1866, shortly after the adoption of the Thirteenth Amendment and before the passage of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1866. Section I of that Act reads as follows:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, *to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the con-*

trary notwithstanding." (Italics added)
14 Stat. 27 (1866).

The portion of that 1866 statute most relevant to this suit is presently found in *42 U.S. Code Annotated §1982,* which reads as follows:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

It is clear that the 1866 Act had its origin in the Thirteenth Amendment.

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities. . . ." *Civil Rights Cases,* 109 U.S. 3, 22 (1883).

It is also clear that the Thirteenth Amendment and Statutes passed pursuant thereto apply to the discriminatory acts of private persons.

> "Under the 13th Amendment, the legislation, so far as necessary or proper *to eradicate all forms and incidents* of slavery and involuntary servitude, may be direct and primary, *operating upon the acts of individuals,* whether sanctioned by state legislation or not; . . ." (Italics added)

Clyatt v. *United States,* 197 U.S. 207, 217 (1905).

In *Civil Rights Cases,* 109 U.S. 3, 22 (1883) this Court stated that "fundamental rights which are the essence of

civil freedom" were intended to be protected by the Thirteenth Amendment and the Civil Rights Act of 1866. While this Court held at that time that the right to non-discriminatory treatment at places of public accommodation was not such a fundamental right, *it also ruled that the right to purchase property was such a fundamental right:*

> "Congress, . . . undertook . . . to *secure to all citizens of every race and color,* and without regard to previous servitude, *those fundamental rights which are the essence of civil freedom,* namely, the *same right* to make and enforce contracts, to sue, be parties, give evidence, *and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.*"
>
> *Civil Rights Cases,* 109 U.S. 3, 22 (1883). (Italics added)

This Court thereby made it clear that *private persons,* as well as the State, cannot deny to others *the right to purchase property because of race,* since the right to acquire property is a "fundamental right" which is the "essence of civil freedom".

The 1866 Act was "re-enacted" in 1870 after the passage of the Fourteenth Amendment (Section 18, 16 Stat. 144).

The re-enactment in 1870 simply emphasized that the act is also directed toward state action. (See *Buchanan v. Warley,* 245 U.S. 60 (1917)).

Both enactments dealt

> "with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."

Buchanan v. *Warley, supra,* at page 79.

In the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926) this Court stated that the Statutes under consideration, including the 1866 Statute, "like the Constitutional *amendment* under whose sanctions they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." (at 331) (Italics added).

However:

1) The *Corrigan* case itself is ambiguous as to whether the Thirteenth or Fourteenth Amendment was being considered the basis of the Statute in question. The *Corrigan* Court referred to *one* Constitution amendment in the quotation above, not specifying whether it referred to the Thirteenth or Fourteenth amendment.

2) This Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) viewed *Corrigan* as being a case determining whether the *Fourteenth Amendment* voided private discriminatory agreements (at page 8) and did not discuss *Corrigan* as reaching any result effected by the Thirteenth Amendment.

3) This Court, in *Shelley v. Kraemer, supra,* and *Hurd v. Hodge,* 334 U.S. 24 (1948) limited and undercut *Corrigan* by ruling that private discriminatory restrictive agreements are unenforceable in state and federal courts.

4) As noted in the *Shelley* case (at page 9), the appeal in *Corrigan* was dismissed by this Court for want of jurisdiction.

The 1866 Statute was re-enacted after the passage of the Fourteenth Amendment, and has, as a result, also been applied to State action. *Buchanan v. Warley,* 245 U.S. 60 (1917); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Hurd v. Hodge,* 334 U.S. 24 (1948). However, in none of those

three cases was the question raised whether the Statute in question also applied to individuals, *since in all three cases state action or judicial action was at issue.* Thus, any statement of the Court as to the requirement of state action under the 1866 Statute is dictum.

Amicus does not question the applicability of the Statute in question to state action since it was re-enacted after the passage of the Fourteenth Amendment. *The issue here,* however, is whether the Statute also applies to private action under the 1866 enactment pursuant to the Thirteenth Amendment. The Civil Rights Cases, 109 U.S. 3 (1883) clearly state that it does apply to such private action.

The case of *United States* v. *Morris,* 125 Fed. 322, (D.C., E.D. Arkansas 1903) is further authority for the propositions that the 1866 statute was passed pursuant to the Thireenth Amendment; that the right to acquire propery is a fundamental right; and that private interference with that right, based on racial grounds, is a violation of a right secured under the Constitution. The Court, in the *Morris* case, spoke as follows:

> "The language of the thirteenth amendment differs materially from that used in the two later ones. While the fourteenth amendment provides that 'no state shall make or enforce any law which shall abridge,' etc., and the fifteenth amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account,' etc., the thirteenth amendment declares, 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.' There is no limi-

tation in that amendment confining the prohibition tion to the states, but *it includes everybody within the jurisdiction of the national government. This distinction in the language of these amendments was fully recognized by the Supreme Court* in the Civil Rights Cases, 109 U.S. 3, 3 Supp. Ct. 18, 27 L.Ed. 835." (Italics added)

(at pages 323 and 324)

• • •

"Every citizen and free man is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are fundamental or natural rights, recognized among all free people."

(at page 325)

• • •

"Can there be any doubt that the right to *purchase, lease, and cultivate lands,* or to perform honest labor for wages with which to support himself and family, is *among these rights thus declared to be 'inherent and inalienable'?*"

(Italics added) (at 326)

• • •

"In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, *as a denial of such privileges is an element of servitude within the meaning of that amendment.*" (Italics added)

(at page 330)

The *Morris* case is a most significant one for this litigation. Interference with a Negro's right to acquire property was held therein to be a violation of the 1866 Statute and the Thirteenth Amendment.

The 1866 Statute and the Thirteenth Amendment should be interpreted by this Court to carry out the clear public policy against racial discrimination.

Constitutional provisions, and statutes, should be construed in light of public policy:

> "The only question for determination is whether this colony is such Indian country. In this inquiry, both the legislative history of the term 'Indian country' and the *traditional policy* of the United States in regulating the sale of intoxicants to Indians are important." (Italics added)
>
> *United States* v. *McGowan*, 302 U.S. 535, 536 (1938).

There is a clear public policy in the United States against racial discrimination and, in particular, against discrimination in housing.

This Court has spoken as follows:

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river."

Berman v. *Parker,* 348 U.S. 26, 32 (1954).

The President of the United States, in Executive Order No. 11197 (February 5, 1965), stated that:

> "(D)iscrimination on the ground of race, creed, color, or national origin is contrary to the constitutional principles, laws, and policies of the United States."
>
> Reprinted at 10 *Race Relations Law Reporter* 940 (1965).

The Supreme Court of Michigan in 1890, held that:

> "Any discrimination founded upon the race or color of the citizen is unjust and cruel, ..."

Ferguson v. *Gies,* 82 Mich. 358, 365 (1890).

The Supreme Court of Washington has described the public policy, which stands opposed to the evils of discrimination, as follows:

> "This court is fully cognizant of the evils which flow from discrimination because of race, creed, or color in a free democratic society. The practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based and with the moral principles which we inherit from our Judeo-Christian tradition. Its effects, in terms of social, economic and psychological damage to the community, are well known. Segregated housing, in particular, is linked intimately with substandard, unhealthy, unsafe living conditions with resultant fire and health hazards. It undoubtedly contributes to insta-

bility in family life, moral laxity, and delinquency. It can and must be eliminated, ..."

O'Meara v. *Board Against Discrimination*, 58 Wash. 2d 793, 365 P. 2d 1, 3 (1961).

Other courts have reached the same conclusion:

"Historically, racial, religious and national prejudices which show themselves in a variety of overt forms of discrimination, have been the subject of major concern to government on a federal, state and local level. It is a well recognized fact that discrimination in housing, as an evil cannot be distinguished from the evils of discrimination in education and business.

"The problems born of discrimination in housing, particularly against Negroes, are particularly acute."

New Jersey Home Builders Association, et al. v. *Division on Civil Rights*, 81 N.J. Super. 243, 195 A. 2d 318 (1963).

". . . segregation and discrimination not only denote inferiority of the class discriminated against, but also retard the development of that class. . . ."

Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio E.D. 1967)

Also see:

Abrams, *Forbidden Neighbors*, Harper & Bros., 1955;

Commission on Race and Housing, *Where Shall We Live?*, University of California Press, 1958;

Glazer and McEntire, *Studies in Housing and Minority Groups,* University of California Press, 1961;

Greenberg, *Race Relations and American Law,* Columbia University Press, 1959;

McEntire, *Residence and Race,* University of California Press, 1960;

Robinson, "Housing, the Northern Civil Rights Frontier", 13 *Western Reserve Law Review* 101, 1961;

United States Commission on Civil Rights, *Housing Report,* 1961;

Weaver, *The Negro Ghetto,* Harcourt, Brace & Co. 1948.

Thus, the public policy in the United States against racial discrimination in housing is clear, and the Thirteenth Amendment and the 1866 Statute should be interpreted in light of that policy.

There is much precedent in the common law for courts limiting dispositions of property for compelling social reasons.

It is almost always true that when rights are enforced (and duties created thereby), other rights are thereby limited.

> "(N)either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

Nebbia v. *New York*, 291 U.S. 502, 523 (1934).

Also see the concurring Opinion of Mr. Justice Frankfurter in *Marsh* v. *Alabama*, wherein he wrote:

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . ." (at 505)

Marsh v. *Alabama*, 326 U.S. 501 (1946).

Courts, for centuries, have limited the right of disposition of property for compelling social reasons. Professor Richard R. B. Powell, *reporter for the American Law Institute's Committee on Property*, has set forth numerous areas where courts have created limitations on property disposition:

> "The power to dispose of owned assets has been outstandingly cut down by
>
> (a) the Rule Against Perpetuities;
>
> (b) the law on unlawful restraints on alienation;
>
> (c) the general law barring illegal or anti-social dispositions; and
>
> (d) the insistence upon formalities as prerequisites for full efficacy.
>
> "Beginning in the late seventeenth century, the Rule Against Perpetuities took final form after a gestation period of a century and a third as a *magnificent judicially manufactured ingredient* of the law designed to curb 'inconvenient' lessenings of the alien-

> ability of property and thus to curb the power of the dead hand to rule the future. It placed outer limits of time on the power of the too often assumed all-wisdom of present owners. Dispositions designed to take effect too far into the future became barred because of the recognized undesirable social consequence of permitting them." (Italics added)
>
> Powell, "The Relationship between Property Rights and Civil Rights", 15 *Hastings Law Journal,* 135, 140 (1963).

Thus, there is support in the common law for limiting dispositions of property for compelling social reasons.

There is also support in the common law for the proposition that there is a civil right to purchase property free of racial discrimination.

In this regard, see the recent case of *Colorado Anti-Discrimination Comm.* v. *Case,* 151 Colo. 235, 380 P. 2d 34 (1962), the Supreme Court of Colorado, while affirming the constitutionality of a Colorado fair housing statute, indicated that *even in the absence of a statute, the Court would "fashion a remedy" for the violation of the right to acquire property, where the right to acquire has been fettered and frustrated by discrimination based on race, creed or color*:

> *"It is the solemn responsibility of the judiciary to 'fashion a remedy' for the violation of a right which is truly 'inalienable' in the event that no remedy has been provided by a legislative enactment.* An inherent human right will be upheld by this court against action by any person or department which would destroy such a right or result in discrimination in the manner in which enjoyment thereof is to be permitted as between

persons of different races, creeds or color."

(at page 40), (Italics added).

The Court continued:

> "We hold that as an unenumerated inalienable right a man has the *right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination* against him on account of his race, creed or color."
>
> (Italics added) (at page 41).

CONCLUSION

The Thirteenth Amendment guarantees the protection of fundamental rights to United States citizens, including the right to acquire property. The 1866 Statute passed pursuant to the Thirteenth Amendment specifically guarantees citizens the right to acquire property against private persons who discriminate because of race or color.

Respectfully submitted,

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